



4th Floor
Riverwalk Office Park
Block A, 41 Matroosberg Road
Ashlea Gardens, Extension 6
PRETORIA
SOUTH AFRICA
0181

P.O. Box 580, **MENLYN**, 0063
Tel: 012 346 1738 / 748 4000
Fax: 086 693 7472
E-Mail: enquiries@pfa.org.za
Website: www.pfa.org.za

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Dear Madam,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,
24 OF 1956 (“the Act”): BA PHETO OBO 2 MINORS (“complainant”) v OLD
MUTUAL WEALTH RETIREMENT ANNUITY FUND (“fund”)**

[1] INTRODUCTION

- 1.1 The complaint concerns the allocation of a death benefit by the fund following the death of its member, Dr L Matlhape (“the deceased”).
- 1.2 The complaint was received by the Adjudicator on 13 February 2024. A letter acknowledging receipt of the complaint was sent to the complainant on 14 March 2024. On the same date, a letter was sent to the fund affording it until 15 April 2024 to file its response to the complaint. The fund filed a response on 15 April 2024. The fund’s response was forwarded to the complainant on 15 April 2024 to afford her an opportunity to file a reply to the fund’s response, if necessary, by 25 April 2024. No further submissions were received from the parties.

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 24 of 1956. The service offered by the Pension Funds Adjudicator is free to members of the public.

Centralised Complaints Helpline for Other Financial Ombud Schemes 0860 OMBUDS (086 066 2837)

- 1.3 Having considered the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 The complainant is the mother of the deceased's biological twins, Kaboentle Pheto ("Kaboentle") and Pakoyaone Pheto ("Pakoyaone"). The deceased was a sperm donor to the complainant, which resulted in the birth of the twins. The deceased was a member of the fund until he passed away on 04 January 2021. The deceased was survived by the following persons:

Person	Relationship
Kaboentle Pheto ("Kaboentle")	Minor daughter
Pakoyaone Pheto ("Pakoyaone")	Minor son
Keabecoe Matlhape ("Keabecoe")	Major son
Kitso Maselesele ("Kitso")	Stepson
Yvonne Munyai ("Ms Munyai")	Customary spouse
Tiro Matlhape ("Tiro")	Stepson
Maphefo Matlhape ("Ms Matlhape")	Customary spouse
Tshidi Matlhape ("Tshidi")	Niece
Maria Matlhape ("Maria")	Sister
Cecilia Pula ("Cecilia")	Niece
Itumuleng Mogoera ("Itumuleng")	Nephew

- 2.2 Upon the deceased's death, a gross death benefit of R787 524.00 before tax became available for allocation to his beneficiaries. The board allocated the death benefit to the deceased's beneficiaries as follows:

Beneficiary	Relationship	Percentage
Keabecoe Matlhape	Major son	80%
Maphefo Matlhape	Customary Spouse	20%

2.3 The fund's decision to exclude Kaboentle and Pakoyaone from the allocation of the death benefit is the subject of this complaint.

[3] **COMPLAINT**

- 3.1 The complainant submitted that she met the deceased in early 2020. She submitted that they had a platonic relationship and later decided to co-parent a child through artificial insemination. She submitted that she became pregnant and the deceased passed away three months into her pregnancy with the deceased's twins.
- 3.2 The complainant submitted that the deceased was a supportive prospective father, actively preparing financially to care for the children. She submitted that the deceased financed various medical appointments and procedures during her pregnancy. She submitted that this was the deceased's way of showing his commitment to be an active and supportive father to her children. The complainant provided texts from the deceased to prove that her relationship with the deceased was more than that of a normal sperm donor.
- 3.3 The complainant submitted that she and the deceased had a mutual desire to be co-parents to Kaboentle and Pakoyaone. She submitted that she is aware that the definition of "parent" in sections 1 and 26(2)(o) of the Children's Act 38 of 2005 ("Children's Act") excludes men who contribute gametes to the production of a child from acquiring parental rights and responsibilities. However, she relies on the case of *R v S* which held that if individuals can provide additional proof of parenthood, such gamete contributors can acquire parental rights and responsibilities. The complainant provided the sperm donor consent form and indicated that the completion of the form was a mere formality. She submitted that factors such as the evolution of her relationship with the deceased, the best interest of the children, and equitable consideration must be applied to this matter.

- 3.4 The complainant provided, *inter alia*, the fund's response to her objection to the allocation dated 30 January 2024, rejecting her claim. She also provided birth certificates for Kaboentle and Pakoyaone.
- 3.5 The complainant requests the Adjudicator to investigate the matter and order the fund to allocate the death benefit to Kaboentle and Pakoyaone.

[4] RESPONSE

Fund

- 4.1 The fund submitted that the deceased was its member from 05 May 2020 until 04 January 2021, when he passed away. It submitted that upon the deceased's death, a death benefit of R787 524.00 before tax became payable to his dependants in terms of section 37C of the Act.
- 4.2 The fund submitted that the deceased does not qualify as a "parent" under the definition in the Children's Act. It submitted that paragraph (b) of the definition excludes biological father by reason of being a gamete donor for purposes of artificial fertilisation. It submitted that given that the twins were born from artificial fertilisation, section 26(2)(b) of the Children's Act excludes the father from making an application to afford him parental rights and obligations.
- 4.3 The fund submitted that section 40 of the Children's Act confirms the position of the sperm donor acquiring no right, responsibility, duty, or obligation related to the children born out of artificial fertilisation. This position is confirmed by the deceased himself in a signed "consent of known donor sperm" from the fertility centre which administered the artificial fertilisation. It submitted that the deceased acknowledges that the children born as a consequence of his act of "sperm donor

insemination” are not his legitimate children with none of the rights and privileges accompanying such status.

- 4.4 The fund submitted that the complainant relies on the matter of *R v S*. However, she does not provide a citation. It submitted that it can be assumed that the case referred to is *Roodt v Scrazzolo* [2019] JOL 44118 (KZD). The fund submitted that the facts of this case did not deal with artificial insemination at all. It submitted that the respondent in this case was impregnated by the applicant through natural insemination and was not married to the respondent. The applicant applied in terms of section 21(1)(b) to be recognized as a parent with accompanying rights and privileges. The court held that the applicant satisfied the requirements of section 21(1)(b)(ii) of the Act, his contributions, or attempts thereto, in good faith to support the child’s upbringing and maintenance. The Court found, on a balance of probabilities, that the father did not sign any waiver form nor did he enter into any “known sperm donor agreement”.
- 4.5 The fund submitted that it carefully considered the complaint and was not convinced that the text conversations provided by the complainant corroborate the alleged deep relationship with the intention of the deceased to assume financial responsibility for the twins.
- 4.6 The fund submitted that it also established from the text messages that the complainant provided in her complaint that the complainant and the deceased did not live together, that the deceased did not visit the complainant regularly, and there is no indication of a discussion related to future financial affairs including the children on his beneficiary nomination or his Will. The fund provided a letter dated 30 January 2024 that was sent to the deceased’s dependants and the deceased’s consent form from the fertility centre in support of its submissions.

- 4.7 In conclusion, the fund submitted that the death benefit was not enough to assist all the dependants' future needs and that the benefit would best serve the minor children.

[5] **DETERMINATION AND REASONS THEREFOR**

Introduction

- 5.1 The issue to be determined is whether or not the fund made an equitable allocation of the death benefit in terms of section 37C of the Act by excluding the complainant's twins from the allocation of the death benefit.

Allocation of death benefit

- 5.2 In the Supreme Court of Appeal ("SCA") matter of *Municipal Employees Pension Fund v Mongwaketse* (969/2019) [2020] ZA SCA 181 (23 December 2020) at paragraphs [42] to [44], Wallis JA held that the rules of a fund are its constitution, and that the doctrine of ultra vires applies. If the rules of a fund do not afford a fund the legal power or capacity to do something then such purported act by the fund is *ultra vires* and accordingly null and void. The Constitutional Court affirmed the SCA's findings in *Municipal Employees Pension Fund and Another v Mongwaketse* (CCT34/21) [2022] ZACC 9 at paragraph [39] where it stated that the application of the *ultra vires* doctrine to pension funds is consistent with the constitutional principle of legality.
- 5.3 The payment of a death benefit is regulated in terms of section 37C of the Act, which provides as follows:

"37C. Disposition of pension benefits upon the death of a member

- (1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit (other than a benefit

payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section (19)(5)(b)(i) and subject to the provisions of section 37A(3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:

- (a) If the fund within twelve months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or, as may be deemed equitable by the board, to one of such dependants or in proportions to some of or all such dependants.”

5.4 It is the board's responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the beneficiaries, to thereafter decide on an equitable distribution, and finally to decide on the most appropriate mode of payment of the benefit payable. Their duties in this regard were summarised in *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA), at paragraph 24 and 25, as follows:-

“When making an “equitable distribution” amongst dependants the board of management has to consider the following factors:

- the age of the dependants;
- the relationship with the deceased;
- the extent of dependency;
- the wishes of the deceased placed either in the nomination form and/or his last will; and
- financial affairs of the dependants including their future earning capacity potential.

In making their decision, trustees need to consider all relevant information and ignore irrelevant facts. Further, the trustees must not rigidly adhere to a policy or fetter their discretion in any other way.”

5.5 Section 1 of the Act defines a dependant as follows:

“**Dependant**, in relation to a member, means –

- (a) a person in respect of whom the member is legally liable for maintenance;
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person –
 - (i) was in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;
 - (ii) is the spouse of the member,
 - (iii) is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock.
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.”

A spouse is defined as a person who is the permanent life partner or spouse or civil union partner of the member in accordance with the Marriage Act, 1961 (Act 68 of 1961), the Recognition of Customary Marriages Act, 1998 (Act 68 of 1997), or the Civil Union Act, 2006 (Act 17 of 2006) or the tenets of a religion.

5.6 The law recognises three categories of dependants based on the deceased member’s liability to maintain such a person, namely, legal dependants, factual dependants and future dependants. In principle, a member is legally liable for the maintenance of a spouse and children as they rely on the member for the necessities of life. In the case of factual dependants, where there is no duty of support, a person might still be a dependant if the deceased in some way contributed to the maintenance of that person. The person alleging to be a factual dependant will have

to prove that he was dependent on the deceased, despite the deceased not having a legal duty to maintain at the time of the member's death.

5.7 Section 40 of the Children's Act deals with the rights of children conceived by artificial insemination and reads as follows:

"40. Rights of child conceived by artificial fertilisation

(3) Subject to section 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gamete have been used for such artificial fertilisation or the blood relations of that person, except when -

(a) that person is the woman who gave birth to that child; or

(b) that person was the husband of such woman at the time of such artificial fertilisation."

5.8 The facts indicate that Kaboentle and Pakoyaone are the deceased's biological children with the complainant. It is undisputed that the deceased was a sperm donor to the complainant, which resulted in the birth of Kaboentle and Pakoyaone. As stated in section 40(3) of the Children's Act above, sperm donors do not acquire parental rights and responsibilities to the children birthed from their gamete contributions unless he is married to the woman giving birth to the child. Therefore, the complainant did not acquire any legal right or responsibility over Kaboentle and Pakoyaone as he was not married to the complainant at the time of his death. Therefore, Kaboentle and Pakoyaone cannot be regarded as the deceased's legal dependants.

5.9 Kaboentle and Pakoyaone can also not be regarded as factual dependants due to the fact that the deceased did not contribute to their financial needs. They also had no relationship with the deceased after the artificial insemination.

5.10 The complainant is dissatisfied with the allocation of the death benefit and relies on the notion that the deceased paid for various medical appointments and procedures. Therefore, she avers that the deceased had intentions to be an active father to Kaboentle and Pakoyaone. However, the complainant had a platonic relationship with the deceased as their relationship was absent of romance or intimacy. The text messages provided by the complainant attest to this and were correctly analysed by the fund as insufficient to prove that the deceased intended to be financially responsible for Kaboentle and Pakoyaone. Further, the fact that the deceased may have paid for the complainant's medical expenses as *ad hoc* payments during her pregnancy does not constitute dependency for Kaboentle and Pakoyaone on the deceased as this does not negate the provisions of section 40 of the Children's Act. Therefore, the fund correctly excluded Kaboentle and Pakoyaone from the allocation of the death benefit.

Conclusion

5.11 The fund's task in allocating a death benefit in terms of section 37C of the Act is to identify all the potential beneficiaries (see *Van Schalkwyk v Mine Employees' Pension Fund and Another* [2003] BPLR 5087 (PFA) at paragraph 15). The board of the fund is vested with discretionary powers to decide on an equitable distribution of the death benefit. It is only in cases where it has exercised its powers unreasonably and improperly or unduly fettered the exercise thereof, that its decision can be reviewed (see *Mongale v Metropolitan Retirement Annuity Fund* [2010] 2 BPLR 192 (PFA)). The duty of the Adjudicator is not to decide what is the fairest or most generous distribution, but rather to determine whether the board has acted rationally and arrived at a proper and lawful decision (see *Ditshabe v Sanlam Marketers Retirement Fund & Another* (2) [2001] 10 BPLR 2579 (PFA), at 2582 F-G).

5.12 In light of the above, the Adjudicator is satisfied that the board of the fund took into account relevant factors and did not fetter its discretion in the allocation of the deceased's death benefit. Thus, the complaint falls to be dismissed.

[6] **ORDER**

6.1 In the result, the complaint cannot succeed and is therefore, dismissed.

DATED AT PRETORIA ON THIS 21ST DAY OF JUNE 2024

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court.

Parties: unrepresented